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Supreme Court of the United States

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,

Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF

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The instant petition for a writ of certiorari was filed, in manuscript, March 30, 1953. Three days later, on April 2, 1953, the Government filed its printed brief in opposition, prior to service upon it of a copy of the petition or record.

Conceived in indecent haste, the Government brief cavalierly disposes of the issues raised by the petition without any serious attempt to meet them and by deliberately evading those which it cannot meet. It is not surprising, therefore, that its presentation contains significant omissions and misstatements of fact and law, which necessitate reply.

1. *The Atom-Bomb Sketch Perjuries:* The Government evades the issue of the glaring failure of the Court below to acknowledge or treat with the petitioners' major allegation of perjury by David Greenglass with respect to his incapacity to have produced, in September 1945, a sketch of the cross-section of the Nagasaki atom bomb and a

twelve page explanatory report, and, in consequence, his incapacity to have reproduced, in 1951, for trial purposes, a replica of the sketch—Exhibit 8—and the accompanying explanatory testimonial data (Gov't. Opp. Brief, pp. 9-10).

The relevant portions of the decision below, set forth in the footnote,[1] reveal either utter disregard or ignorance of the petitioners' contention.

The Government further confuses the issue of perjury relating to Greenglass' capacity to have produced a sketch of a cross-section of an atom bomb, and therefore its replica, Exhibit 8, by lumping together the replicas of the alleged lens mold sketches, *i.e.*, Exhibits 2, 6 and 7, with Exhibit 8. Its brief states "Petitioners * * * presented the affidavits of four scientists who expressed the opinion that Greenglass * * * could not have made the sketches" (Gov't. Opp. Brief, p. 9).

No claim was made by the petitioners that Greenglass was incapable of producing the purported originals of Exhibits 2, 6 and 7, the lens mold sketches, to the blueprints of which he had had access. The opinion of the scientists that Greenglass could not have reproduced the replicas of these lens mold sketches, from memory alone, without outside aid, was based at least in part on disbelief of his claimed powers of memory when they concluded that it was improbable that he could have drawn replicas of these lens mold sketches from memory alone over five years later.

But no factor of memory was relied on with respect to Greenglass' ability to reproduce a replica of the cross-

[1] "The second specification relates to Greenglass' testimony that, the day before he began to testify, he made from memory *certain drawings of lens molds* [Exhibits 2, 6, 7 only] used several years before at Los Alamos at the atom-bomb project. The petitioners contend that it would have been impossible for him to make *these sketches* from memory and hence his testimony that he did so was false and the prosecution must have known it to be false. This is nothing new * * *" (R. 335). (Emphasis added.)

section of the Nagasaki atom bomb, Exhibit 8, and explanatory data. The scientific affidavit attested that Greenglass could not originally have sketched a cross-section of an atom bomb (or explained its workings) because of his lack of scientific knowledge and the loose and unscientific manner in which Greenglass acquired, according to his testimony, bits of information concerning the bomb from unspecified persons and at unspecified times. As a conclusion from this, it is said, he could not have produced the replica without having been coached.

Once the proof shown, as in the record here, goes beyond "memory" to "capability" of having performed at all, the attack on the testimony, is not, as the Government asserts: "a continuation of an attack on * * * credibility" (Gov't. Opp. Brief, pp. [redacted]. It is proof, not of a *likelihood* that the witness spoke falsely, but proof positive that the witness *could not possibly have told the truth, i.e.*, that he had perjured himself.

The error in the Government's contention stems from its complete identification of "perjury" with "credibility". While "perjury" involves credibility at all times insofar as proof of perjury entitles testimony to no credit, it differs from "credibility" insofar as impeaching material only *tends to show* that the testimony should not be given credence, while proof of perjury *forecloses any possibility of according it credence.*

If the Government's formulation were to prevail, since "credibility" has always been determined by jury in a criminal case, there could never be an attack on a judgment by collateral attack which bases itself on the charge of the use of perjury. The law is clearly otherwise, since the decision of *Mooney* v. *Holohan*, 294 U. S. 103.

2. *The Passport-Photographer Perjury:* To refute the charge that Schneider committed perjury, the Government asserts that "today" was treated by both court and counsel

"as meaning before the trial" and outlandishly cites in support C. R. 1429 and C. R. 1437 (Gov't. Opp. Brief, p. 10). The cited record, to any reasonable mind, reveals precisely the contrary, and it is small wonder that the Government seeks to hide this fact by confining itself to citation of the record pages alone, rather than their content.

The full relevant portions of the testimony are reproduced for the Court's independent consideration:

C. R. 1429 (direct examination by the prosecutor):

"Q. Did you then deliver it [photos] to Mr. Rosenberg? [in May or June, 1950]. A. Yes, sir.

Q. Did he pay you? A. That's right, sir.

Q. And is that the last time you saw him before *today?* A. That's right.

Q. Now, when the agents came to visit you *yesterday,* did they show you photographs? A. They did.

Q. Was it from those photographs that you picked him out? A. That's right.

Q. And is it seeing him here *now* with his wife that recalls it to your memory that they were the persons who came in? A. That's right; that's right." (Emphasis added.)

C. R. 1437 (cross-examination by defense counsel):

"Q. Did you see the Rosenbergs from the time you say they took pictures in your place, in June 1950, *until the time you walked into this courtroom?* [2]

The Court: He answered that question.

Mr. E. H. Bloch: I am sorry.

Mr. Saypol: *I object to it.*

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[2] Obviously defense counsel did not know during the trial that Schneider had been brought into the courtroom the day prior to his testimony, owing to the deliberate concealment of this fact by the prosecuting attorney and the witness on direct examination. It was not until over a year later, that petitioners were able to discover the fraud perpetrated (R. 86).

The Court: *You object because it has just been answered?*

Mr. Saypol: *Yes.*

The Court: I understood he answered. He said 'No.'

Mr. E. H. Bloch: He said 'No'?

The Court: That is right." (Emphasis added.)

Again, the Government's contention that the Schneider perjury—important as it related to identification of the petitioners—was on an immaterial point, is founded on its distortion of the record to reach the conclusion that "the Rosenbergs had not denied that they might have gone to his [Schneider's] shop" to "take pictures" (Gov't. Opp. Brief, pp. 10-11). The Government interprets the record to show that the petitioners *admitted* that, although they denied taking *passport* photos, they had taken *some kind* of pictures in Schneider's shop. The record does not bear out this interpretation (C. R. 1277-80; 1361-64).

3. *The Greenglass "confession" Perjury.* The petitioners' showing of the knowing use of perjured testimony relating to Greenglass' lie as to his "immediate confession" is so plain as almost to require no reply to the Government's contentions, except to emphasize again its effort to dispose of charges of perjury by a play on words. Obviously, when the prosecutor spoke of "subsequent recantation of * * * protestations" of innocence, it could refer only to a recantation by Greenglass, the only one who had previously so protested. This is not a "discrepancy" between "the degree of his earlier cooperation" and a "fuller cooperation" of both Greenglasses after the intervention of his wife, as the Government states (Gov't. Opp. Brief, p. 8). According to the prosecutor himself, there was *no* "earlier cooperation" on the part of Greenglass, but only "protestations of innocence". It is, therefore, an inescapable conclusion that David Greenglass lied when he testified to an

"immediate confession". That this testimony was adduced on cross-examination, cannot absolve a prosecutor from sitting idly by and permitting his witness to commit perjury seems, also, too apparent to require comment. It is shocking, however, that such a contention should be advanced by the Solicitor-General of the United States.[3]

4. *The Perl Indictment*: The best that can be said of the Government's response to the petitioners' contentions in relation to the Perl indictment, is that the Government, in its rush to oppose the issuance of a writ of certiorari, neither read nor understood the petition or the factual foundation for the contentions laid in the record. The purposeful elision of the contentions, which is apparent in its argument, however, marks a sense of justice so immoral as to make it shocking that such consciences and minds direct the administration of federal criminal justice.

The Court below *found*—and it is revealing that the Government "forgets" to mention it—that the prosecution deliberately "timed" the Perl indictment with intent to injure the petitioners, misconduct that Court could not "too severely condemn". The Government's "short answer"—it has many "short" but inapt answers—is that the "petitioners have waited "too long" and may not raise this issue in a "collateral attack" (Gov't. Opp. Brief, pp. 18-19). It would, under any circumstances ill-befit the Government to cry "too late" where its own conduct created the injuries of which complaint is made. In the instant case, "too late"

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[3] The Government suggests that the petitioners did not ask for the first statement of Greenglass "although Greenglass' hazy recollection of its contents might be said to have laid a foundation for such a request" (Gov't. Opp. Brief, p. 8, ftn. 2). The law does not permit that anything of the kind "might be said". Since no discrepancy appeared *at the trial* between Greenglass' trial testimony and his explanation of the pre-trial statement, a request for the production of the pre-trial statement could not have been honored. Wigmore, *On Evidence* (3rd Ed.) §§ 1017, 1040; *cf. The Charles Morgan*, 115 U. S. 69 (1885); *United States* v. *Krulewich*, 145 F. 2d 76 (C. C. A. 2nd, 1944).

cannot be any answer, since the deliberate lie of the prosecutor served to conceal his imposition upon the processes of justice until such later time as only collateral attack on the judgment was then available to the petitioners to invalidate the corrupted conviction.

The decision of the Court below, as it related to the prejudicial newspaper publicity accompanying the "timed" Perl indictment, clearly makes necessary the rejection of the Government argument that petitioners are foreclosed from raising the issue herein because they had neither requested a cautionary instruction nor shown that the jurors had read the newspaper articles concerning the Perl indictment (Gov't. Opp. Brief, p. 19). Neither, according to the Court of Appeals, was decisive to its determination. It stated: "We may assume that, in this case, a cautionary instruction would not suffice, and that if the defendants had moved for a new trial, it should have been granted" (R. 334).

The Government brief fails to take into account or overcome the facts found in the record which conclusively negate the inference, unjustifiably drawn from the omission to move for a new trial, of "deliberate choice" not to so move, and the further inference, piled on the prior inference: that the petitioners believed that they had not been prejudiced. It is not enough to say that "the matter was called to the trial court's attention" (Gov't. Opp. Brief, p. 18). The question is: *what*, as a matter of fact, was called to the trial court's attention? It is not enough to say that the matter "then [was] not pressed" (*Ibid.*). The question is: *why* was it not pressed? The failure of the Government to respond on this level, it is respectfully submitted, is accounted for by the indisputable circumstance that no such response is possible to show "deliberate choice", congruent with the facts shown in the record. The only hope of the Government is to ignore the existence of such facts in the expectation that the facts may thus be hidden from the view of this Court. The answers to the

critical questions, above, as shown by the record, are fully and freely set forth in the Petition herein (*See*, Petition, pp. 46-47). They refute the inference of "deliberate choice", or inferences said to flow therefrom, and preclude the legal conclusion that petitioners may not now, by collateral attack, enforce their demand to set aside the verdict, tainted, beyond recall, by the conniving of the prosecution.

5. *Pre-trial Publicity.* The Government's familiar defense of "too-late" is again raised, although with less assurance—as evidenced by its lame and dishonest efforts to justify on the merits—in relation to the charge that the verdict was affected by the massive pre-trial publicity, *caused and prompted by the Government*, tending to bring about a communal prejudgment of the petitioners' guilt and hostility toward them.[4]

The main reliance of the Government is placed on its attempt to distinguish *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1st, 107), in order to mitigate the conflict between that decision (in the First Circuit) and the decision of the Court below (in the Second Circuit). Its grounds for distinction where the reliance is on law, are ludicrous, and where it claims the distinction rests on facts, it ignores or warps and distorts the significance of the showing of the record.

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[4] This Court has made it clear that, *as a matter of law*, the failure to raise this issue by pre-trial motions does not preclude relief by collateral attack. Compare majority opinion in *Stroble* v. *California*, 343 U. S. 181 (1952), with the dissent of Frankfurter, J., at 198. *See also: Delaney* v. *United States*, *supra*, and *Morse* v. *Montana Ore-Purchasing Co.*, 195 F. 334 (C. C. D. Mont. 1900). The Government, therefore, chooses to circumvent this rule by endowing a legally irrelevant circumstance, *per se*, with factual significance. Again, the Government to do this, ignores the full facts shown by the record as to *why no pre-trial motions were made*. It relies, instead, on one factor (defense counsel's "sporadic" newspaper reading) which, taken out of context, distorts the true picture. The facts are fully set forth in the Petition herein at pp. 52-54.

(a) The Government states that in the *Delaney* case "the publicity * * * was generated by a Congressional committee * * * " (Gov't. Opp. Brief, p. 12), whereas, here it was only by the prosecution itself. Aside from the patent stupidity of this distinction, the Court in *Delaney*, specifically said (at 114): *"Of course, it would have been gross impropriety on the part of the prosecuting officials if they had made available to the press all this damaging material respecting Delaney * * *."*

(b) The Government asserts a distinction based on the fact that in *Delaney* the issue was raised on direct appeal rather than by collateral attack (Gov't. Opp. Brief, p. 12). That no legal significance attaches to this difference has been shown by the petitioners. *See:* footnote 4, *supra;* Petition, p. 52.

(c) The Government asserts that, unlike the situation in *Delaney* (i) the prejudicial publicity did not continue up to or through the trial (Gov't. Opp. Brief, pp. 12-13); and (ii) in any event, the Government statements were not prejudicial or inflammatory in nature (Gov't. Opp. Brief, pp. 16-17). Both of these assertions are refuted by the record (see Petition, pp. 23-28; Appendix to Petition, *passim*). Even the Court below did not reach this conclusion. It concluded merely that "the Delaney publicity was more obviously damaging and much closer to the date of trial * * *" (R. 333). This, patently, is different from saying that the publicity in the instant case was *not* damaging, or not *close enough* to trial.

Quite the contrary, there is an apparent identity of issues between *Delaney* and the instant case, and a divergence in the principle upon which they are decided. As pointed out in the Petition herein at p. 51, *Delaney* is premised on the proposition that direct proof of a perverted jury mind is not only an impossible burden, but it is as a matter of law, an unnecessary one, prejudice being presumed from a showing of such pre-trial publicity as could

create a communal prejudgment of guilt. Were this Court to follow *Delaney*, as petitioners urge, the contentions of the Government (and the rulings of the Court below) that the prejudice was eradicated by *voir dire* questioning or cautionary instructions, would have no significance. The petitioners submit that *Delaney* should be followed because of the correctness of its thesis that: "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." *Delaney* v. *United States*, *supra*, at 112-13; *see* Appendix to Petition.

Respectfully submitted,

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